ROBERT LEE KINSEY
v.
U.S. POSTAL SERVICE

DOCKET NO.
SF07528110566

OPINION AND ORDER

Appellant filed a timely petition for appeal with the Board's San Francisco Regional Office from the agency's action removing him from his position as a full-time Distribution Clerk. Appellant was charged with absence without official leave (AWOL) from October 28, 1980, through October 31, 1980; failure to notify the office of his inability to report for duty as scheduled, and AWOL on October 26, 1980. The notice of appellant's removal also informed appellant of elements of his past disciplinary record which were considered in taking the proposed action, to include: a letter of warning for unsatisfactory attendance, a seven day suspension for being on duty under the influence of alcohol and/or drugs, and four (4) fourteen day suspensions for unsatisfactory attendance.

Appellant did not reply personally or in writing within the allowable time limit to submit a response and the deciding official, on January 20, 1981, notified appellant that he would be removed effective January 26, 1981.

Appellant filed a timely appeal, but indicated on the Board's appeal form that he did not desire a hearing.[1] Subsequently, by letter dated March 16, 1981, the presiding official notified appellant that the record in his appeal would close on April 24, 1981, and that all evidence must be received by that date. However, other than the previously filed appeal form[2] with the "Notice of Charge" and the "Letter of Decision" attached, appellant made no submissions to the Board for its consideration in rendering a decision based solely on the record or to substantiate his opposition to the agency action. Because of appellant's failure to respond to the agency's submissions and the Board's "close of record" notice, the presiding official

[1]As part of the Board's acknowledgement letter dated February 17, 1981, appellant was afforded a second opportunity to request a hearing, but apparently declined to avail himself of that opportunity. Therefore, his actions are deemed to constitute a waiver of his right to a hearing.

[2]On his appeal form appellant intimates that he believes the agency was wrong in taking the action against him because "the proper substantiation required for the charged absences was presented and submitted to the proper management official." Appellant, however, failed to explain what "substantiation" was presented to agency management or proffer any evidence to support his contention.

concluded that appellant had abandoned and failed to prosecute his appeal. He, therefore, dismissed the appeal with prejudice.

Appellant petitioned for review alleging, *inter alia*, that his attempts to secure pertinent documents from the agency (e.g. PS 3971s) have been unsuccessful, and that he is a recovering alcoholic which compounded the difficulty in comprehending elements of his defense. Neither allegation is meritorious.

In the event an agency refuses to voluntarily make pertinent documents reasonably available prior to a Board proceeding, the Board's rules provide for the issuance of orders compelling discovery by interrogatory or deposition under 5 C.F.R. § 1201.73–75, and for the issuance of subpoenas under 5 C.F.R. § 1201.81–85.[3] Because appellant's representative failed to avail himself of these simple procedures to obtain information necessary to prepare or present his case, he may not now claim harm by the refusal of the agency to assist voluntarily in his preparation for proceedings before this Board. See *Fuiava v. Department of Justice*, 3 MSPB 217 (1980).

We are also unpersuaded by appellant's allegation that he is a recovering alcoholic. Appellant's alleged alcoholism does not constitute new and material evidence that, despite due diligence, was not available when the record was closed. 5 C.F.R. § 1201.115(a). However, inasmuch as appellant did, on his appeal form set forth a basis, albeit an unsubstantiated one, for his appeal, and the agency submissions were a matter of record, we find that there is sufficient evidence of record to issue a decision on the merits.

From our review of the record, we find that the unrebutted charges of AWOL against appellant for October 26, 1980, and October 28–31, 1980, and his failure to notify the agency of his inability to report for duty as scheduled,[4] coupled with his past disciplinary record and overall unsatisfactory attendance, are sufficient to sustain his removal for such cause as would promote the efficiency of the service. We further find that the appellant's failure to request a hearing and his failure to submit additional evidence prior to the closing of the record do not, without more, support the presiding official's conclusion that appellant failed to prosecute his appeal. To support such a conclusion, there must be evidence of appellant's continued failure to comply with an order or request of

[3]The presiding official, by letter to appellant and his designated representative dated February 17, 1981, advised both parties as follows:

> The Board's appellant regulations are found in Title 5, Code of Federal Regulations, Part 1201. These are available for review in the offices of the Board, agency personnel or employee regulations offices, and in some large public libraries. We urge all parties to review these regulations for detailed information on the practices and procedures followed by the Board in processing an appeal.

[4]See notice of proposed removal dated December 16, 1980.

the presiding official. *Bennett v. Department of the Navy*, 2 MSPB 93 (1980). In the instant case, there is no evidence in the record showing that appellant neglected to respond to any order of the presiding official. Thus, the presiding official erroneously concluded that the appellant failed to prosecute his appeal. However, such a conclusion, under the circumstances of this case, does not constitute reversible error. Therefore, based upon the merits and findings hereinbefore stated, we conclude that appellant's removal for five days of sustainable AWOL charges, coupled with his past disciplinary record and overall unsatisfactory attendance, was reasonable. See *Douglas v. Veterans Administration*, 5 MSPB 313, 329 (1981).

Accordingly, under the provisions of 5 C.F.R. § 1201.117, the Board hereby REOPENS this appeal, VACATES the finding of the presiding official as it pertains to the dismissal of this appeal for failure to prosecute, and, based upon the evidence of record supporting appellant's removal, we SUSTAIN the agency action.

In this regard, the Board need not, and will not, address other arguments raised in appellant's petition for review as they will not alter the decision reached herein.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *July 20, 1982*